

Exhibit G

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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: TERRORIST ATTACKS ON
4 SEPTEMBER 11, 2001

03 MDL 1570

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February 8, 2010
10:30 a.m.

7 Before:

8 HON. FRANK MAAS

9 Magistrate Judge

10 APPEARANCES

11 KREINDLER & KREINDLER
Attorneys for Plaintiffs
12 BY: JAMES KREINDLER
ANDREW MALONEY

13 ANDERSON KILL & OLICK, P.C.
Attorneys for Plaintiff O'Neill
14 BY: JERRY S. GOLDMAN

15 COZEN O'CONNOR
Attorneys for Plaintiff Federal Insurance
16 BY: SEAN CARNER

17 MOTLEY RICE
Attorneys for Burnett Plaintiffs
18 BY: ROBERT HAEFELE (via telephone)

19 ROTTENBERG LIPMAN RICH
Attorneys for Defendants Sana Bell, Inc
and Sanabel Al Kheer
20 BY: CHRIS MANNING
EURYDICE KELLEY

21 BERNABEI & WACHTEL PLLC
Attorneys for Defendant Al Haramain
Islamic Foundation (USA)
22 BY: ALAN R. KABAT

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APPEARANCE (Continued)

LAW OFFICE OF STEVEN BARENTZEN

Attorneys for Defendant Dr. Yagub Mirza

BY: STEVEN BARENTZEN

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1 be a substitute.

2 THE COURT: It could be, but I'm not going to require
3 it.

4 MR. BARENTZEN: One last point I'll make just for the
5 record here, so it's all on the record: Whatever delay may
6 have occurred quite frankly is plaintiffs' own fault.

7 Had they in the beginning of this come to Dr. Mirza
8 and asked me do you have documents, where are they, I could
9 have told you five years ago we don't have them.

10 Whatever dispute happened between the plaintiffs and
11 Sanabel, I still can't really wrap my head around it, but we
12 got caught in the crossfire here. I found out about it and
13 jumped into this case and voluntarily said we don't have
14 documents. That somehow Dr. Mirza and I are somehow
15 responsible for the delay the plaintiffs are suffering here is
16 just not the case at all.

17 THE COURT: OK. Well, I have made my ruling.
18 Should we move on to Al Haramain?

19 MR. HAEFELE: I imagine that's me, your Honor.

20 THE COURT: OK.

21 MR. HAEFELE: May it please the court, first of all,
22 thank you for accepting my appearance by telephone. I promise
23 I had multiple flights to come up there to be with you but they
24 were all canceled.

25 THE COURT: A likely story, but that's fine.

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1 MR. HAEFELE: You are probably better off anyway.
2 Really, you don't need me coughing in your courtroom.

3 THE COURT: I can probably hear you better on the
4 phone than if you were in the courtroom. Go on.

5 MR. HAEFELE: Well, first, I think your Honor noted
6 one of the first things that I did want to call to your
7 attention, that we're in full blown merits discovery with Al
8 Haramain, so any notion that there's any limitation as to any
9 discovery, other than any limits that the federal rules put on
10 us, they don't apply here.

11 The other point that I wanted to make, your Honor, is
12 the need to avoid discover delay, and I just believe we have
13 emphasized that to your Honor on multiple occasions, the need
14 to avoid delay and obtaining discovery. And in your Honor's
15 most recent decision regarding discovery, your Honor recognizes
16 the need to avoid discovery delay, and those principles apply
17 no less. That rationale your Honor provided there regarding
18 avoiding prejudice to the other side doesn't apply here where
19 we are in merits discovery with Al Haramain.

20 THE COURT: With respect to Al Haramain U.S.

21 MR. HAEFELE: Well, yes, your Honor, that's correct.
22 I will get into the other aspect of that in a moment, but, yes,
23 with regard to how Al Haramain, what I would call the U.S.
24 branch office of Al Haramain.

25 This court has express policy against allowing

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1 defendants to shield documents from discovery by moving
2 documents abroad, and that same principle applies concerning
3 what I will call shape shifting corporate entities to avoid
4 discovery and accountability.

5 Borrowing from the language from one of the cases I
6 cited in the brief, your Honor, Cooper Industries, 102 F.R.D.
7 918, if a defendant could so easily evade discovery, every U.S.
8 company would do the same thing. Here in this case it would be
9 keeping documents out of the U.S. at a headquarters or
10 resisting collecting discovery until after dissolving or making
11 other branch offices disappear.

12 That principle of treating commonly controlled
13 entities as singular entities for discovery was also supported
14 in the Alcan International case that we cited, which was 176
15 F.R.D. 75. Like in Alcan, here the Al Haramain entities are
16 unquestionably all members of a unified worldwide business
17 under common control, using the same corporate logo and with
18 regular contact, particularly given the overlap and leadership
19 of the two entities.

20 As in Alcan, the court -- in Alcan the court said it
21 was inconceivable -- and I would say that's true here -- that
22 the U.S. entity through its actors would not have access to the
23 headquarters' information, particularly through the very same
24 overlapping acts.

25 Your Honor, in both of our letters we set out a number

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1 of factors to be considered to treat Al Haramain and the Al
2 Haramain headquarters as alter egos of each other. And what I
3 would like to do, your Honor, if you have the letter, the
4 January 5 letter that we sent your Honor, I would refer you to
5 page 2 of that letter. Do you have that?

6 THE COURT: I'm sure I do. Bear with me a second.

7 Yes.

8 MR. HAEFELE: On page 2, I think it's in the second
9 paragraph, we went through and we referenced some case law that
10 sets out a number of factors to be recognized in considering
11 whether to disregard juridical separateness of companies or
12 entities. And going through them, what I would like to do is
13 walk the court through some of the documents that we submitted
14 and show you evidence supporting treating the U.S. office as
15 the alter ego of the Riyadh headquarters, if that's ripe, your
16 Honor.

17 THE COURT: Sure.

18 MR. HAEFELE: Well, if we go one through 15, through
19 the factors, the first factor that's referenced there just
20 doesn't apply here because they're talking about common or
21 overlapping stock ownership, and we are talking about entities
22 that don't have stock ownership here. So, that one wouldn't
23 apply.

24 The second fact does apply, which is common or
25 overlapping directors or officers. And we have three principal

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1 officers or directors of the U.S. branch office. And for those
2 there, Mr. Al Akil, who is in Saudi Arabia, who is the
3 president of the U.S. branch office; the U.S. branch director,
4 GM of the Riyadh headquarters. And those items are identified
5 in Exhibits 14, 15 and 16.

6 Actually 14, 15 and 16 are important for all three of
7 the directors. Mr. Al Khati, who is also in Saudi Arabia is
8 vice president of the U.S. branch, as shown on Exhibits 15 and
9 16. He is the U.S. branch director, as shown in Exhibit 14.
10 He is the deputy director of Al Haramain Riyadh, as shown in
11 Exhibit 18. Mr. Al Butay is also in Saudi Arabia. He is the
12 treasure of the U.S. branch, as shown in Exhibits 15 and 16.
13 He is the U.S. branch director, as shown in Exhibit 14. He
14 worked from the Riyadh office, as shown in Exhibits 19 and 20.
15 He is the lawful representative in the U.S. of Al Haramain
16 headquarters, as shown in Exhibit 10.

17 If we skip down to the next factor, your Honor, the
18 use of the same corporate offices. And what we see is that in
19 Exhibit 22 we see that the Al Haramain website, which is used
20 jointly by both the Al Haramains, identify the U.S. office as
21 the U.S. branch office of Al Haramain. The website also
22 identified Riyadh as the head office and the U.S. branch office
23 as the Al Haramain Educational Center. That's in Exhibit 23.

24 Both the headquarters and U.S. branch regularly use
25 the same website, the same letterhead and the same logo without

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1 any kind of distinction. And that's in a variety of exhibits
2 from 24 through 35 and then 50 through 58.

3 I don't actually have the exhibits referenced here,
4 but I think certainly the anticapitalization of the
5 subsidiaries, which is the next factor, there are a variety of
6 documents that show that Al Haramain branch office in the U.S.
7 pretty much lived off of the money, the funding that was coming
8 in from Al Haramain headquarters, and that's through a number
9 of correspondence back and forth between the two where Al
10 Haramain U.S.A. is asking for money to do any kind of repairs
11 to the buildings, and it indicates that the salaries paid to
12 the Al Haramain people in the U.S. came from the funding that
13 came from the headquarters.

14 The next factor, which is an overlapping factor I
15 think, is the financing of the subsidiary by the parent.
16 Exhibit 10 shows that Al Akil appointed Al Butay the power of
17 attorney on headquarters letterhead to pay any property,
18 equipment, materials, people, for the express purpose of
19 support and maintenance of the goals and objectives of Al
20 Haramain activities in the U.S. Now, that's the way that Al
21 Haramain in the U.S. branch office got open because of the
22 power of attorney given from the general manager in the Riyadh
23 headquarters to the U.S. representative -- sorry, the U.S.
24 representative of the headquarters in Riyadh.

25 THE COURT: That was used to acquire the building,

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1 among other things, correct?

2 MR. HAEFELE: It's basically a general power of
3 attorney so that the Riyadh office could act in the U.S. through
4 Mr. Al Khati. So anything that he used to open up and start
5 the U.S. branch office was covered by that power of attorney.

6 Exhibit 7 also shows it switches the OFAC directory,
7 Newcomb's memo about Al Haramain. He says the Al Haramain
8 Foundation headquarters under Al Akil's leadership provided
9 funding and instructions that governed the activities
10 throughout the world, including U.S. and elsewhere.

11 If we go to factor number seven, the parent's use of
12 subsidiary's property and assets as its own, just a variety of
13 the documents we submitted, including Exhibits 10, 14, 43 and
14 44, all go to this factor.

15 Again, 10 is the power of attorney. And in 14 we see
16 that Al Butay brought money from the Al Haramain headquarters
17 in Riyadh to the U.S. to buy the U.S. branch property for the
18 branch office use. And he also brought money apparently from
19 the headquarters in Riyadh to the U.S. to buy property in
20 Missouri to build a mosque, and the money went through Al
21 Haramain U.S. bank accounts to buy the property in Missouri.

22 Those factors also show the informal intercorporate
23 loan transactions that have -- that's factor number eight --
24 which shows that instead of making formal loan transactions,
25 they were just bringing money into the U.S. from the

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1 headquarters to buy the properties both in Missouri and in
2 Oregon.

3 THE COURT: One way in which to conclude that
4 documents of a foreign entity must be produced pursuant to a
5 document request or subpoena to a domestic entity is
6 practicability in the ordinary course of business to secure
7 such documents. I guess that would be among others the Cooper
8 Industry case where Judge Edelstein basically ended up saying
9 it's inconceivable that they can't.

10 When I looked through the exhibits -- and I did --
11 most of them seemed to be the U.S. entity asking for permission
12 to do things, asking for money and the like. I didn't notice
13 as I went through it -- and I can't say I studied each
14 document -- instances in which in effect the U.S. entity was
15 saying we need particular documents from you and showing a
16 degree of control, if you will, over the Saudi entity.

17 So, correct me if I'm wrong, it seems to me your
18 argument is that applying the factors you are going through,
19 they should be treated as alter egos of one another rather than
20 saying, as some of the cases say, the U.S. entity had
21 practicability to control what occurred in Saudi Arabia.

22 MR. HAEFELE: Well, your Honor, I think the answer is
23 both really. I think there is evidence that shows though
24 certainly the headquarters dominated and controlled the branch
25 office. There is no doubt about that.

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1 THE COURT: No, I am asking whether there is an extent
2 to which and documents to support the conclusion that the U.S.
3 entity had a measure of control, or, forget control, just the
4 practicability to get documents that it wanted from Saudi
5 Arabia.

6 MR. HAEFELE: I would say the latter, your Honor.
7 Certainly not the former, I don't think, because of the control
8 of the headquarters over the branch. I think the
9 practicability is present as well because there are instances
10 where they asked for information and they got it.

11 In the normal course of business if the branch office
12 asked for information -- I think there is one instance where
13 they asked for Albanian literature to give out to the Albanian
14 refugees, and they wanted to be able to provide Islamic
15 literature for the Albanians. They asked for it and got it.
16 And I think just the fact that they asked -- when they asked
17 for money for various things, they were able to get it. So if
18 they asked for it, they were certainly able to get these
19 things.

20 THE COURT: OK. I interrupted you as you with going
21 through the list of factors.

22 MR. HAEFELE: OK. But to finish up your thought, your
23 Honor, yes, the other aspect is what I was working on, which is
24 that the evidence shows more than just that there is an ability
25 to get documents; it's that they are the alter ego of each

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1 other. Ands that's the factors I was working on, so your Honor
2 is right on that.

3 THE COURT: I have had the issue, quite frankly, arise
4 with worldwide accounting firms, where typically there is the
5 U.S. entity, there is entities in a host of countries, and
6 frequently there is a logo but not a worldwide overseer in any
7 particular locality. And I have had that issue arise at least
8 twice with arguably inconsistent results but based on the way
9 in which particular accounting firms operated and held
10 themselves out. So, it seems to me that it's a very fact bound
11 inquiry.

12 MR. HAEFELE: I agree, your Honor, and I think that's
13 what the case law said, which is why I thought it helpful if I
14 went through and walked you through each of the factors, to
15 show you that there was some evidence indicating that at least
16 by my count nine or ten of the factors, if not more, weigh in
17 favor of alter ego relationship.

18 THE COURT: And I take it you don't dispute that as to
19 this issue the plaintiffs have the burden.

20 MR. HAEFELE: As to the issue of showing that there is
21 some evidence of this? Yeah. Which I think that we have.

22 THE COURT: Well, what I was referring to is that you
23 have the burden of establishing that there is a basis for
24 saying that the two should be treated as fungible in terms of
25 documents.

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1 MR. HAEFELE: Yes, I agree.

2 THE COURT: OK. Go on. I'm sorry.

3 MR. HAEFELE: I think we have indicated factor eight,
4 informal intercorporate loan transactions. We have Exhibits 10
5 and 14.

6 Then we move to incorporation of the subsidiary by the
7 parent. And the fact of the matter is that the Akil power of
8 attorney to Al Butay indicates that Mr. Al Butay was sent to
9 the U.S. for the purpose of setting up the entity that's the
10 U.S. branch. And when it was eventually set up the directors
11 became directors that I referenced earlier, which is three of
12 them are headquarters people, and the fourth is Mr. Sayer or
13 Mr. Seragati, who is the local person in Oregon that they used
14 to be the person on the ground.

15 You also have Exhibit 44 which is a visit from a
16 headquarters person reporting on the U.S. office, saying that
17 Al Haramain took on a great responsibility when deciding to
18 open the office in the U.S.

19 Moving to factor eleven, decision making for the
20 subsidiary by the parent and the principals. And the documents
21 we submitted are just rife with examples of that, including
22 Exhibit 7, 8 and 9. Exhibit 7 is Director Newcomb's memo
23 regarding the degree of interaction among Al Haramain branches
24 and the headquarters in Riyadh, noting that Al Akil had treated
25 the entirety of Al Haramain's one entity absolutely centralized

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1 and that Al Haramain's director Al Khati characterized out
2 Akil's governance of Al Haramain as autocratic and centralist,
3 including all of the branch offices.

4 Al Akil was the quote only individual with the full
5 decision making on spending and the one with the authority to
6 hire employees, even if it was just a janitor. And then if we
7 look at Exhibits 26, 27, 28, 29, 34, 36, 37 and 38, they all
8 show various examples of the U.S. office asking the Al Haramain
9 Riyadh headquarters for funding for various things, from
10 electrical repairs, to building repairs, to property repairs,
11 to literature for the Albanians, the funds to shelter a camel
12 they had in the Oregon office.

13 And then one Exhibit, 29, the U.S. office is asking
14 Riyadh for approval, advice and immediate support on these goals
15 and ambitions, and to give them future backing.

16 All of these documents show that the decision making
17 for the subsidiary came from the parent.

18 Factor Twelve is the subsidiary's directors do not act
19 independently in the interest of the subsidiary but in the
20 interest of the parent. And this is important because I think
21 part of the evidence for this is that three of the four
22 individuals that run Al Haramain in the U.S. are Saudi
23 individuals that work with the headquarters. Exhibits 7, 8 and
24 9 support the factors, especially because Al Akil was the
25 director of both the U.S. branch and the Riyadh headquarters.

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1 And Exhibit 43, which is the letter from an attorney at
2 Bernabei to OFAC recognizes that \$150,000 in donations to the
3 U.S. office were sent to the Riyadh office.

4 Fact Fourteen is the nonobservance of formal legal
5 requirements. And two instances of that that are evidenced are
6 in Exhibit 14 which indicated in two instances Mr. Al Butay
7 bringing substantial sums of money into the U.S. to buy
8 property for the branch office, the property in Oregon and
9 property again in Missouri.

10 And just some other factors that aren't in the 1
11 through 15 but I think that are important are the overlapping
12 identification of the two offices. Exhibit 5 shows
13 alphabetical listing of SBNs and block persons, and it lists
14 the alternate name of Al Haramain Islamic Foundation as Al
15 Haramain United States Branch.

16 THE COURT: I understand that aspect of it. I'm not
17 sure how somebody from the Saudi entity bringing money to the
18 U.S. falls under the category of nonobservance of formal legal
19 requirements.

20 MR. HAEFELE: Well, instead of doing the formal loan
21 transactions that ought to have been performed if they were
22 considered to be separate entities, instead of making a loan or
23 instead of putting on paper formal transactions, what they did
24 is they just slipped money into the U.S. and put it into bank
25 accounts for the U.S. entity and ran with it.

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1 If they were separate entities, your Honor, then there
2 should have been loan documents that indicated that there were
3 separate entities that were involved, and I don't see any
4 indication of that.

5 THE COURT: OK.

6 MR. HAEFELE: So, running through the documents that
7 we submitted, your Honor, by my count there is one, two, three,
8 four, five, six, seven, eight, nine, ten of them, plus another
9 one of the overlapping identifications, 11 of 16. And, you
10 know, I'm not going to say we need to weigh and if I get over
11 half of them we're good. But, as a whole, if you look at it
12 not only do 11 of the 16 match, but out of the ones that are
13 left they just don't apply under the circumstances because they
14 can't apply. For example, there is no stock here. The parent
15 exists solely as a holding company of the subsidiary, that sort
16 of applies. It's really just a holding entity for all the
17 others, but it's that plus more.

18 The parent and subsidiary file consolidated income tax
19 returns is another factor but that doesn't apply here because
20 they don't file income tax in this country.

21 So, I think if you weigh all of the factors, your
22 Honor, what we get is a very strong indication that Al Haramain
23 U.S.A. is the alter ego of the headquarters. And that seems to
24 be exactly what the U.S. government has indicated when it has
25 identified the headquarters as being the branch office of the

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1 headquarters.

2 THE COURT: Go on.

3 MR. HAEFELE: There are just some other problems that
4 we would ask the court to take into account as well, and some
5 of these I think were highlighted earlier in the argument that
6 we heard a few moments ago regarding Sana Bell, and it has also
7 been the subject of other discussion before your Honor, and
8 that's what I would call -- well, I think Mr. Kriendler earlier
9 referred to it as a shell game, but I would call it the
10 problems with the mystery of the disappearing corporations and
11 the mystery of corporate assets.

12 The one problem is the shell game with the corporate
13 entities being either dissolved or mysteriously disappearing,
14 and it's become a theme in the litigation. And that's one of
15 the problems that I think Mr. Kabat has indicated in his
16 response and said, well, the headquarters doesn't exist
17 anymore, so what are we to do? Well, the answer is that we are
18 to try and get -- first of all, they were supposed to get all
19 of the documents responsive to discovery from the get-go, and
20 if they didn't do that then that's a problem we need to face as
21 well.

22 The other problem is the problem of ignoring -- what I
23 will call the mystery of the corporate actions. And the
24 defendants seem to keep pointing to these corporate entities as
25 though they act mysteriously on their own. They don't. They

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1 act through the individuals that are the corporations. And so
2 if there are individuals that are involved here, those
3 individuals are the individuals that we need to look to to get
4 the documents from. Al Haramain acts through the individuals,
5 and yet they ask the court to ignore that fact.

6 Some of the people -- in this instance represented by
7 the very same counsel -- have filed what clearly contain Al
8 Haramain documents. One of the affidavits that came back to us
9 in the reply indicates that Mr. Al Butay has a file that has at
10 least some Al Haramain documents in it. We didn't get those.
11 They came to us. We didn't get them from Al Haramain directly
12 as a result of the various requests; they came because they
13 happened to be in an OFAC file. They were provided by Al
14 Haramain to OFAC when they wanted to make their own arguments.

15 THE COURT: Mr. Al Butay submitted an affidavit
16 though, as did Mr. Nelson, both of which you say are
17 insufficiently specific, at least one of which seemed fairly
18 specific. So, I'm not sure what your gripe was there.

19 MR. HAEFELE: Well, I would have to look back, your
20 Honor, but there is a curious problem with the affidavits. The
21 affidavits that were submitted with the motion or the
22 opposition regarding the efforts employed to get responsive
23 documents came from someone who at the time that's pertinent
24 here had little to do with Al Haramain until fairly recently.
25 He was not a director at the time. He is not listed in the

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1 document as being a director until fairly recently.

2 THE COURT: That's Mr. Nelson.

3 MR. HAEFELE: That's Mr. Nelson, yes, your Honor. And
4 we get nothing about those efforts on the three or four primary
5 actors for Al Haramain at the time, at least two who are also
6 represented by the same counsel. And those people, I think
7 Mr. Seda and Mr. Al Butay, are both I believe represented by
8 the same counsel as Al Haramain U.S.A. branch. And I don't
9 recall as to Mr. Al Akil. But it raises the issue of Al
10 Haramain's efforts to actively collect responsive documents in
11 a timely and complete manner, when none of the documents that
12 were submitted back to us -- including the one that came from
13 Mr. Al Butay himself -- indicates what efforts were actually
14 done to try and collect documents in a timely manner and in a
15 complete manner. We don't know. We know very little, if
16 anything, on the efforts that have been made by Al Haramain to
17 get documents from Mr. Al Akil, from Mr. Seragati or from
18 Mr. Al Butay. You know, he could have said something in his
19 declaration, but he didn't.

20 And none of these players at Al Haramain ever say
21 anything about any efforts to obtain documents, despite the
22 fact that they have been in Saudi Arabia for years following
23 9/11. And instead we get a single affidavit from a relative
24 outsider to Al Haramain, saying very little about any of the
25 efforts made to get the information.

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1 And on that issue, your Honor, that is pretty much
2 what I had to say. I think there is several other issues that
3 were raised, including the counting interrogatories or whether
4 we should use interrogatories more or less. And in that
5 instance I think your Honor I would rely on what we wrote in
6 our letters.

7 And the other issue, your Honor, the problem is the
8 definition of material support for requests 15 and 16, and we
9 just have a problem where we were specific in terms of what we
10 were requesting, and they come back and they try to define it
11 as saying, well, because the word "material support" showed up
12 in the request we take the liberty of saying unilaterally our
13 stuff wasn't material support. That not what the request was,
14 your Honor.

15 THE COURT: Well, at so that one it seemed to me the
16 problem may be where the comma is or isn't placed. But we will
17 get to that as we go forward.

18 Mr. Kabat? Is that the way you pronounce it?

19 MR. KABAT: Yes.

20 THE COURT: OK.

21 MR. KABAT: Good morning, your Honor. Let me just say
22 we're here more than five years after producing more than
23 50,000 pages of documents and publications and the CD-ROMs with
24 all the financial records from the Oregon group. Now, we
25 exchanged a lot correspondence with plaintiffs counsel way back

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1 in '03, '04 and '05. Plaintiffs did not then respond to most
2 of the issues we raised in our correspondence, and plaintiff
3 waited over five years to really raise the discovery issue with
4 the court.

5 Now, the fundamental problem that I have with their
6 motion to compel, is it's not a motion to compel about the
7 activities and operations of the Oregon Group. Instead,
8 plaintiff, they are trying to use the Oregon Group as a method
9 for obtaining information about the activities and operations
10 of the Saudi Group, which is another defendant.

11 And I submit that you should deny the Burnett
12 plaintiff's motion to compel because essentially the plaintiffs
13 are seeking discovery from the Oregon defendant of documents
14 and information that's in the possession, custody and control
15 of other defendants, principally the Saudi defendants, Saudi Al
16 Haramain Group.

17 THE COURT: I thought your position is -- maybe I
18 misunderstood it -- that the Saudi Foundation at least couldn't
19 produce documents because the Saudi government shut it down.
20 Are you talking about documents in the possession of the
21 individuals who were the officers, or in the possession of the
22 Saudi Foundation, or both?

23 MR. KABAT: Well, plaintiff is trying to seek both
24 through --

25 THE COURT: No, I understand plaintiffs want

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1 everything. But what you were saying was, well, don't give
2 them the documents held by the -- I think you used the phrase
3 Saudi defendants, one of whom is the Foundation itself, and in
4 your papers there were representations that the Saudi
5 Foundation was shut down by the Saudi government, which sounded
6 like, you know, put a padlock on the front door.

7 Is that what you're saying? Or does the Saudi
8 Foundation in fact have access to documents?

9 MR. KABAT: It is my understanding they do not. Since
10 the government closed it down both Mr. Albans and Mr. Nelson
11 have made repeated attempts while in Saudi Arabia to obtain any
12 documents, because, after all, they could be exculpatory
13 documents for us as well. We would like to get that
14 information too, but we can't.

15 THE COURT: Well, one of the things -- and I
16 understand the points you have made about delay, and certainly
17 I don't disagree with you there were long gaps between when you
18 write back to the plaintiffs and when they respond at times --
19 but one thing they want to focus on, which the affidavits that
20 you submitted don't seem to address, is what happened in the
21 period after either it was apparent that litigation was
22 imminent or certainly when the earliest of these lawsuits was
23 filed between then and when the Saudi government shut down the
24 Saudi Foundation, in terms of preserving documents? I mean
25 that, it seems to me, is one of the issues that Mr. Haefele and

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1 others are trying to focus on undoubtedly as the precursor to
2 an exfoliation motion.

3 MR. KABAT: Well, your Honor, I can't speak to what
4 the Saudi defendants have done with respect to its documents,
5 but I can only say for ourselves, our positions. The case
6 originated with Judge Robertson. In fact one of the very first
7 motions involved that we are independent, a separate corporate
8 entity from the Saudi defendant, and our position in fact
9 during the initial discovery conference we had back in August
10 of '03, almost seven years ago, was we only have possession,
11 custody and control of the Oregon Group documents. We produced
12 those documents in '04. So, our position has always been it's
13 a separate corporate defendant, we don't have custody and
14 control of the Saudi defendant documents.

15 I don't see where that puts an obligation on us to
16 tell another defendant, represented by another counsel, oh, by
17 the way, you need to preserve your documents just in case the
18 plaintiffs come after us in order to get your documents.

19 I mean there are numerous defendants in this case.
20 It's not my responsibility to issue document preservation
21 letters to codefendants.

22 THE COURT: Well, but that really is the issue.
23 Mr. Haeefele says going through these 15 factors that 11 weigh
24 in his favor and most of the others are simply inapplicable.
25 If you use those factors or some other factors and he's right

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1 that I guess both as a matter of law and fact the Saudi and
2 U.S. entities should be viewed as a single organization, then
3 what you just said in terms of it not being your obligation may
4 be wrong. Right?

5 MR. KABAT: Well, that sort of begs the question of
6 why the plaintiff named the Oregon Group as a separate
7 defendant. We were served separately with a subpoena out in
8 Ashland. Plaintiff from the outset recognized that the Oregon
9 defendant was a separate one. They did not try to name it as
10 one defendant. They had a different subpoena. We were served
11 out in Oregon. They were served -- Saudi Group I believe was
12 served by publication -- I'm not sure now -- but the plaintiff
13 recognized at the outset these were different defendants, they
14 had to be sued and served separately.

15 THE COURT: OK.

16 MR. KABAT: I'd like to add to some of the other
17 points that Mr. Haefele mentioned.

18 THE COURT: Sure.

19 MR. KABAT: First of all, Mr. Haefele made reference
20 to the fact that the Oregon Group requested publication from
21 the Saudi Group. We point out, first of all, those were
22 primarily various Islamic type publications which we have
23 produced in discovery, but Islamic publications, religious
24 publications, are not the same as corporate operational
25 documents. As your Honor recognized, we did not see anything

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1 in the document where the Oregon Group was requesting these
2 sort of corporate operational documents from the Saudi Group.
3 I would just like to mention two cases that I think are
4 dispositive of the plaintiff's discovery request. The first
5 case is the Securities and Exchange Commission --

6 THE COURT: Which one?

7 MR. KABAT: Securities and Exchange Commission v.
8 Credit Bancorp, a case from 2000, Judge Sweet of this court.
9 Judge Sweet said that the burden is on the party seeking
10 discovery to make a showing that the other party "has control
11 over the materials sought".

12 We simply do not have control over the Saudi Group
13 documents.

14 The other case I want to emphasize is the Second
15 Circuit's opinion, and it's a hard name to spell, the
16 Shcherbakovskiy case, Second Circuit 2007. It held that it was
17 reversible error to impose sanctions on the party for failing
18 to produce documents from a related overseas corporate entity,
19 since, as the Second Circuit said, a party is not obligated to
20 produce documents that it does not possess or cannot obtain.
21 The Shcherbakovskiy holding I submit applies with equal force
22 here.

23 And there is a third decision by Judge Chin of this
24 court called M'Baye v. New Jersey Sports. And Judge Chin found
25 that if the party made an effort to get documents from an

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1 overseas agent but was unsuccessful in getting those documents,
2 that showed that the party lacked the requisite control over
3 the documents.

4 THE COURT: Well, that's why I was asking Mr. Haeefele
5 those questions. He being a good lawyer wouldn't concede that
6 that was not a theory that the plaintiffs could prevail on, and
7 he pointed, when I asked about the U.S. entity's ability to
8 compel the Saudi entity to do something, he pointed to
9 requesting literature and getting it, which frankly it seems to
10 me isn't the most persuasive evidence that the U.S. entity
11 might have practical control such that it could in effect at
12 the stage when both of these foundations were going concerns so
13 that it could say we don't care what you think, Saudi Arabia,
14 send us money or send us literature, I suppose.

15 And I think that the evidence that the U.S. entity
16 could compel anything from the other entity is slim at best and
17 perhaps nonexistent. I haven't studied, as I think I said
18 before, all of the exhibits, although I have looked at them
19 all. But as I read the case law, they don't have to make that
20 showing if they can show that as a matter of law and fact the
21 two entities should be treated as one entity. And certainly
22 they were separately sued, but I'm not sure that's dispositive.

23 If the interrelationship between the two is so great
24 that they should be viewed as one, then it seems to me it's
25 appropriate to say that discovery addressed to the U.S. entity

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1 calls for documents in the possession, custody or control of
2 the Saudi entity as well. And I think the operative time
3 period, I think we're dealing with a window period here which
4 is: What was the case that the date that the suit was filed or
5 reasonably anticipated, up until the point that the discovery
6 requests first were served?

7 So, you know, if I had to take a snapshot, I guess it
8 would be that I need to focus on that period of I guess two
9 years or so.

10 MR. HAEFELE: Your Honor, can I make two additional
11 points?

12 THE COURT: Well, why don't you let Mr. Kabat finish.

13 MR. HAEFELE: Absolutely. I thought he was done. My
14 apologies.

15 THE COURT: You couldn't see he was working down at
16 his papers for his next point.

17 MR. KABAT: Yeah. During that brief time period in
18 which the lawsuit was filed, which I believe was in August 2002
19 roughly, when the discovery requests were served, which I
20 believe was in October or November of '03, during that time
21 period in fact when the two groups were moving apart, the
22 Oregon Group got the resignation of two of the directors. Two
23 of the three Saudi directors resigned from the board of the
24 Oregon Group. What was also happening during that time period
25 is back in February of '04, while we were still discussing the

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1 discovery issues, the Department of Treasury initiated an
2 investigation of the Oregon Group, which consequently limited
3 the ability of the Oregon Group to do anything other than
4 retain counsel and litigate. So, we were not then in a
5 position to escalate our -- the Oregon Group was not in a
6 position to escalate its involvement with the Saudi Group
7 because the director of the Saudi Group was himself also under
8 investigation by Treasury at that same time period. So, during
9 that period that your Honor identified, the two groups were
10 moving apart partly because of the ongoing Treasury
11 investigation.

12 So, as a practical matter, thinking back to that time
13 period I don't see how we could have easily gotten the Saudi
14 Group documents given that the Saudi government was starting
15 his own move against Al Haramain, Saudi Arabia.

16 And I will defer to Mr. Haefele.

17 THE COURT: Your turn, Mr. Haefele.

18 MR. HAEFELE: Thank you. I'm having trouble hearing
19 Mr. Kabat.

20 Well, the one point I would like to make to your
21 Honor -- and I think it goes to something that your Honor was
22 saying, as well as the overall picture -- is that there is this
23 fiction that there is no connection.

24 In addition to everything that I have already said,
25 your Honor, something that's very important to keep in mind

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1 here is that the head of the Saudi office and the vice head of
2 the Saudi office, numbers one and two in the Saudi
3 headquarters, were also numbers one and two in the U.S. branch
4 office. So, to say that there was no control, no ability, no
5 say, is a fiction.

6 And, in addition to that, since three of the officers,
7 those two plus Mr. Al Butay, are also at the Saudi office, much
8 of the information about the Saudi office or that's available
9 in the Saudi office goes very importantly to what was known or
10 knowable to the Oregon office. So, what's known or knowable at
11 headquarters, what's known or knowable throughout the Al
12 Haramain network is all pertinent.

13 One important issue in the case is what the Oregon
14 Group's activities were with the main office, so information
15 about the communications between the offices is important, but
16 it also includes the knowledge in the main office about the
17 activities of Al Haramain overall. They were a part of that
18 network, and to the extent that Al Haramain was doing things
19 that were inappropriate, improper under the law, that go to
20 terrorist support, terrorist financing, and the Oregon office
21 continued in that network with that knowledge, that's all very
22 important with regard to the plaintiffs' claims.

23 So, what the U.S. branch office knew about Al Haramain
24 worldwide is important, and that's discoverable, your Honor.

25 THE COURT: One thing I haven't heard any mention of

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1 in this discussion, although the papers speak to it, is the
2 Quran Foundation.

3 MR. HAEFELE: I can speak to that briefly, your Honor.
4 The Quran Foundation is basically Mr. Seda. Mr. Seda set it
5 up. Mr. Seda pretty much did the same thing.

6 The Al Haramain entity basically came on the scene to
7 supplement and to enlarge the size, enlarge the scope of, to
8 enlarge the financial capabilities of what the Quran Foundation
9 is doing. The Quran Foundation was Mr. Seda. Everything that
10 he did under the Quran Foundation he eventually did that and
11 more under Al Haramain's name. They had the same office, they
12 were run by the same guy, they had the same staff, they shared
13 offices, phone numbers, computer networks. Everything that was
14 the Quran Foundation was what Mr. Seda was doing with Al
15 Haramain. There is really no distinction.

16 THE COURT: But for purposes of the present motion,
17 what is the relief you want? Is it a ruling that the two Al
18 Haramain foundations should be viewed as a single entity?
19 Well, clearly it's that, that they should be viewed as a single
20 entity such that the Saudi Arabian entity should be producing
21 documents or should have preserved documents at an earlier
22 time. But beyond that what is it you are seeking presently?

23 MR. HAEFELE: You know, our position is since they are
24 alter egos, to the extent we have requested information from Al
25 Haramain the U.S. branch, that requires them to produce

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1 anything that the U.S. branch or that can be gotten related to
2 the greater Al Haramain knowledge of what was going on in Al
3 Haramain worldwide.

4 As to the Quran Foundation, since it really is the
5 same, and since they shared information, and since a number of
6 the documents that have been produced indicate that there was
7 really little distinction between things going on at the Quran
8 Foundation, things going on at the Al Haramain foundation the
9 U.S. branch, there is a problem that there may be substantial
10 documents in Mr. Seda's possession that relate to work that was
11 done for either or. And since that distinction is dissolved
12 for the most part, we want to see the documents from the Quran
13 Foundation that relate to Al Haramain, and I think that's the
14 way the request was made.

15 THE COURT: Is Mr. Seda a defendant in the suit?

16 MR. HAEFELE: Yes, he is. I believe the discovery is
17 open to him as well. I think his motion to dismiss was also
18 denied.

19 THE COURT: OK. Well, I guess one question would be
20 has he been subpoenaed -- not subpoenaed -- has he been given a
21 request for production of documents?

22 MR. HAEFELE: He has not, because we understood that
23 the request to the Al Haramain Foundation was sufficient. And
24 he was the U.S. officer. I mean we could do it, but it would
25 be redundant.

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1 THE COURT: Well, it might be, but it might not be.
2 Who represents him, by the way, do you know?

3 MR. HAEFELE: The same lawyers, your Honor, Mr.
4 Kabat's office.

5 MR. KABAT: Yes.

6 THE COURT: I'll ask him the question: If he were
7 served with a request for production of documents individually,
8 would it yield any more documents?

9 MR. KABAT: I don't think so, your Honor, because what
10 happened is that when Mr. Seda was overseas, the government,
11 you know, seized all the documents that were in the Ashland
12 office, and then they turned them over to his defense attorney
13 in Portland. He is represented by the public defender. They
14 in turn gave us a copy, and we produced those to the
15 plaintiffs. So, that seems to be the totality of what was in
16 the Ashland office.

17 THE COURT: There was also a discussion in the various
18 papers I received about the extent to which various requests
19 or, more particularly, interrogatories were overbroad or the
20 objections to those interrogatories were boilerplate. Should
21 we discuss that today, or is it more appropriate for me to
22 first decide the issue we have been talking about thus far and
23 then see where that take us?

24 MR. HAEFELE: Your Honor, I would go whichever way
25 your Honor would prefer.

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1 MR. KABAT: Your Honor, I would agree you should
2 decide the first issue. And I would also note that the
3 plaintiffs' reply brief, the January 5 brief, did not address
4 any of our response on the overbroad and so forth issues, so
5 they're fully submitted on the papers.

6 THE COURT: OK. Well, then I will focus first on the
7 issue of whether the -- well, I guess it's one and a half
8 issues -- whether the Saudi entity and the U.S. entity should
9 be viewed as one in the same, and if the Saudi entity comes
10 into the loop, whether that implicates all of the worldwide
11 activities of the Foundation, since I gather there were what
12 Mr. Haeefele would call and I guess at times what the Foundation
13 called branch offices in other countries.

14 MR. HAEFELE: Your Honor?

15 THE COURT: Yes.

16 MR. HAEFELE: Two points that I would like to make to
17 your Honor, fairly simplistic I hope.

18 THE COURT: Sure.

19 MR. HAEFELE: We didn't respond to the additional
20 issue related to the scope or the burden or the breadth of the
21 discovery requests in our later letter because we thought we
22 did cover it substantially in our December 2 letter on pages 14
23 and 15. But the other issue is if you look at our December 2
24 letter, on the bottom of page 15 there is a really important
25 typo that I would like to correct for your Honor.

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1 THE COURT: Is that the one where you left out the
2 word "not"?

3 MR. HAEFELE: Yes, it is.

4 THE COURT: I caught that. I read it twice because it
5 did seem to be a change in your position.

6 MR. HAEFELE: I read it a lot over the weekend and
7 tried to figure out where that word "not" was.

8 THE COURT: I had already taken the liberty of
9 correcting that in my copy.

10 MR. HAEFELE: Thank you, your Honor.

11 THE COURT: OK. As to this issue I'm going to reserve
12 decision.

13 The next conference before Judge Daniels is scheduled
14 for April 15. I haven't a clue whether he will hold that
15 conference or not, but I wanted to alert everyone and let
16 whoever is not here who needs to know know that I have asked
17 him if it is held on April 15 to move it to the afternoon
18 because I have a conflict in the morning. So if it occurs, and
19 assuming it occurs on April 15, it's likely to be the
20 afternoon, not the morning.

21 Anything else anybody wants to bring up today?

22 MR. CARNER: A minor thing we mentioned earlier. As I
23 mentioned, we are in this difficult situation where discovery
24 is ongoing as to Al Haramain in one case but its motion remains
25 pending in the rest of the cases. And we very much would like

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1 to try to harmonize the situation. So, to the extent that
2 we're going to make an application, would you prefer that go to
3 you or to Judge Daniels?

4 THE COURT: No, I think that one should -- basically
5 to say that everybody ought to be involved in whatever
6 discovery is permitted as to Al Haramain U.S. and/or Saudi
7 Arabia?

8 MR. CARNER: That's correct, your Honor.

9 THE COURT: No, I think that should come to me.

10 MR. CARNER: OK. Thank you, your Honor.

11 THE COURT: OK. Thank you, all.

12 MR. HAEFELE: Thank you, your Honor.

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